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Supreme Court of the United States

OCTOBER TERM, 1906.

No. 159.

D. S. OSBORNE ET AL.,
TRUSTEES OF CARRICK ACADEMY,
PLAINTIFFS IN ERROR,

vs.

R. A. CLARK AND WINCHESTER NORMAL COLLEGE,
DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Tennessee.

MOTION, BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

WILLIAM L. GRANBERY,
CHARLES C. TRABUE,
Solicitors for Defendants in Error.

BRANDON-NASHVILLE

Supreme Court of the United States.

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Plaintiffs in Error,

vs.

R. A. CLARK, AND WINCHESTER NORMAL COLLEGE,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

MOTION, BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

May it please the Court:

This cause is here upon writ of error to the Supreme Court of Tennessee.

Motion.

Defendants in error, R. A. Clark and the Winchester Normal College, respectfully move the Court that this cause be dismissed, or affirmed, for the reason that no Federal question was raised or decided in the State Court.

The grounds of this motion are set out and discussed hereinafter on pp. 7, *et seq.*

STATEMENT OF THE CASE.

This suit was brought by Osborne and others, "as Trustees of Carrick Academy, of the County of Franklin, and in their own right *as citizens and taxpayers of said county*, and for and in behalf of the school children of said county, and in behalf of the citizens and taxpayers of said county."

The suit was tried below upon bill and demurrers.

The *sole question presented and determined below* was whether *a certain lease* of a school building by the Trustees of Carrick Academy (incorporated) to the Winchester Normal College (incorporated) was valid. The Court held it to be valid.

The lease was for fifty years, and was made and recorded *in 1881.*

The suit had been determined on, and the bil drafted before this lease seems to have been discovered by complainants. The bill avers at its close that "since the foregoing parts of the bill were drawn" complainants "have discovered" the existence of the lease; and they then aver its invalidity. (Rec., p. 13.)

The lease was in terms authorized by an Act of the Tennessee Legislature, being Chapter 63 of the Acts of 1881, as follows:

> SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the Trustees of Carrick Academy are hereby *authorized** to lease the academy property to the Trustees of the Winchester Normal College for a period not exceeding fifty years.
>
> SEC. 2. *Be it further enacted*, That, *if the lease is made*,* it shall be the duty of the trustees of said college to keep the property in good condition and free from debt or encumbrance of any kind, and a failure to comply with these requirements shall render the lease null and void.
>
> SEC. 3. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it.

*Italics ours.

Specific objections to the constitutionality of this Act were stated in the bill. *All of these constitutional objections related to the Constitution of Tennessee.*

A brief resume of the origin and history of Carrick Academy is shown in the bill, and is as follows:

A certain dispute arose in 1799, after the admission of Tennessee into the Union, between Tennessee and North Carolina, regarding the right to dispose of vacant and unappropriated lands of the State. It was settled in 1806 by an agreement, to which Congress gave assent, which provided that the lands in Tennessee lying west and south of a certain line therein established should "be and remain at the sole and entire disposition of the United States," and that the United States thereupon ceded to the State of Tennessee all of its right and claim "to the territory of the lands lying east and north of the line hereinbefore established." (Rec., p. 8.)

A copy of this agreement is attached as "Exhibit 1" in an appendix to this brief.

It was provided in this agreement, among other things, that the State of Tennessee should set apart 100,000 acres of land "for the use of two colleges;" and another 100,000 acres in one tract "for the use of *academies*, one in each county in said State, to be established by the Legislature thereof;" and yet other lands for the use of common schools. (Rec., pp. 8, 9.)

The Tennessee Legislature in 1806, and in pursuance of this provision relating to academies, incorporated an academy for each county of the State, and in 1809, when Franklin County was created, incorporated the "Trustees of Carrick Academy for the County of Franklin," and invested it with the same powers and authorities that had been given to the other county academies. A copy of the Act establishing the first academies, and a copy of the Act establishing Carrick Academy, are attached as "Exhibits 2" and "3" in the appendix. (Rec., p. 9.)

The Trustees of Carrick Academy "acquired" a tract of land in the town of Winchester, and established a school, and "*with its pro rata of the funds arising from the sale of the academy lands, and other sources,*" conducted the school "until the fund arising from the sale of the academy lands had been *exhausted,*" which was some time prior to the Civil War. (Rec., p. 9.)

After the war the building was used as a public school, and when not so used was leased to individuals to be used, and was used, *for private schools*, until the year 1870. (Rec., p. 10.)

In 1870 the defendant Clark obtained possession of the property, and since then has used it *for school purposes* under leases, and is now in occupation of it under *a lease made by Carrick Academy in 1881* to the Winchester Normal College, of which latter institution Clark is averred to be the sub-lessee. (Rec., pp. 10, 11.)

This lease of 1881 to the Winchester Normal College was *in writing*, and was duly *recorded*. (Rec., pp. 14, 15.) It is this lease that is attacked.

Under its original charter, the *Trustees of Carrick Academy and of the other county academies were appointed* from time to time *by the State Legislature*, but by a subsequent Act this power of appointment was vested in the several county courts. (Rec., p. 10.)

Plaintiffs in error were made Trustees of the Carrick Academy by the county court in 1902, *twenty-one years after* this lease had been made and recorded. During all of this time defendants in error had been in possession. (Rec., p. 12.)

The *prayer of the bill* was that the lease be declared invalid, and for "a sale of the academy property," and that the proceeds arising therefrom "be paid *into the treasury of the County of Franklin*, for the benefit of the school fund." (Rec., p. 14.)

The *demurrers* of defendants presented the questions that the suit was barred by the statutes of limitation; that plaintiffs

in error were estopped to sue; and that the lease had ample authority in the original charter and in the Act of 1881. (Rec., pp. 16, 17.)

In March, 1904, the cause was heard on appeal by the Supreme Court of Tennessee. *That Court held the lease to be valid, and dismissed the bill.* (Rec., p. 23.)

Three facts appear in the record that are proper to be borne in mind in considering this case. They are:

1st. That the support provided for Carrick Academy was *exhausted prior to the Civil War,* and that when the Act of 1881 was passed the academy was *moribund.*

2d. That the purpose of the Act and of the lease was to preserve Carrick Academy *to the cause of education* in the best way that was practicable—to lease it out for educational purposes; and

3d. That the object of this suit is *to destroy the identity of the Academy,* by selling it and disposing of its proceeds.

In this Court it is now assigned as error that the Supreme Court of Tennessee should have held the Act of 1881 to be unconstitutional on the ground that it impaired the obligation of a contract—the contract referred to being the charter of Carrick Academy.

BRIEF AND ARGUMENT.

On behalf of defendants in error it is respectfully submitted:

I. On Motion to Dismiss. That this Court is *without jurisdiction* of the cause, for the reason that the question of the unconstitutionality of the Act of 1881, as impairing the obligation of a contract, was not raised or decided in the State Court.

II. On the Merits. That the Act of 1881 does not impair the obligation of any contract, for the reasons:

(A) That the obligations of the charter of Carrick Academy, *if the charter was a contract*, were not impaired, because:

(1) Carrick Academy *already had*, under its original charter, the fullest powers of disposition of its property; and,

(2) The Act of 1881 was *not in its nature such an Act as could impair* the obligation of a contract. At the most, it merely conferred a power on the corporation, to be exercised or not, at its will. It impaired no contract obligation; and,

(3) If the Act of 1881 might otherwise have impaired any contract obligation, yet it was *assented to and acquiesced in and acted under* by Carrick Academy *for more than twenty years* prior to the institution of this suit, so that the corporation cannot now be heard to complain.

These reasons are applicable *upon the theory* contended for by plaintiffs in error, that the Trustees of Carrick Academy was *a private corporation*, and that its charter was therefore a contract which the State might not impair. But it is confidently asserted by defendants in error:

(B) That the Trustees of Carrick Academy was *a public corporation*, and that it was therefore subject to such governmental regulation as was contained in the Act of 1881.

I.

MOTION TO DISMISS.—NO FEDERAL QUESTION.

The Federal question sought to be presented here is whether or not Chapter 63 of the Acts of 1881 violates Section 10 of Article 1 of the Federal Constitution, inhibiting the States from passing "any law impairing the obligation of contracts."

This is *the only Federal question* insisted upon by plaintiffs in error.

Was this Federal question raised and decided by the Tennessee Supreme Court in this case?

This Court has repeatedly said that it was without authority to review the decision of a State Supreme Court, unless it *affirmatively* appeared that a Federal question was *actually raised and actually decided;* or, to state it a little differently, unless it appeared that the decision of a Federal question was necessary to the conclusion reached by the State Court.

Murdock v. *Mayor, etc., of Memphis,* 87 U. S., 590; 22 L. Ed., 449.

Detroit City Ry. Co. v. *Guthard,* 114 U. S., 133; 29 L. Ed., 118.

Ex parte Spies, 123 U. S., 131; 31 L. Ed., 80.

Brooks v. *Missouri,* 124 U. S., 394; 31 L. Ed., 454.

Cox v. *Texas,* 202 U. S., 445; 50 L. Ed., 1099.

Adams County v. *Burlington, etc., R. R. Co.,* 112 U. S., 123; 28 L. Ed., 678.

Simmerman v. *Nebraska,* 116 U. S., 54; 29 L. Ed., 535.

Leeper v. *Texas,* 139 U. S., 462; 35 L. Ed., 226.

Bushnell v. *Crooke M. & S. Co.,* 148 U. S., 688; 37 L. Ed., 612.

Loeber v. *Schroeder,* 149 U. S., 585; 37 L. Ed., 859.

Powell v. *Supervisors,* 150 U. S., 439; 37 L. Ed., 1136.

Hale v. Akers, 132 U. S., 554; 33 L. Ed., 442.

In the case of *Murdock* v. *Memphis, supra,* it is said:

> "It is essential to the jurisdiction of this Court over the judgment of a State Court, that it shall appear that one of the questions mentioned in the Act must have been raised, and presented to the State Court."

The other cases cited reiterate this principle.

And it is not sufficient that the Federal question might have been raised. As said in *Murdock* v. *Memphis:*

> "Nor is the mere existence of such a question in the case sufficient to give jurisdiction—*the question must have been decided in the State Court.*"*

In *Crowell* v. *Randell,* 10 Peters, 398; 9 Law Ed., 470, it is said:

> "It is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it *did arise,** and was applied by the State Court to the case."

Chouteau v. *Gibson,* 111 U. S., 200; 28 L. Ed., 400:

> "From the beginning it has been held that, to give us jurisdiction in this class of cases, it must *appear affirmatively** on the face of the record, not only that a Federal question was raised and presented to the highest court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case."

(*a*) *The Record Proper.*

The record proper in this case does not show that a Federal question was ever presented in the State Court.

The pleadings consisted of a bill and demurrers thereto. There was no evidence.

*Italics ours.

The bill refers specifically to the Act of 1881, and avers its unconstitutionality. The grounds are stated *seriatim* on page 13 of the record.

Where constitutional objections are pointed out, specific reference is made *in each instance to the Constitution of Tennessee.*

One or two other objections which are apparently intended to be constitutional make no reference to either the State or Federal Constitution, but under the well settled doctrine of this Court they will be conclusively presumed to have referred to the State Constitution.

Porter v. *Foley*, 65 U. S., 415; 16 L. Ed., 740.
Miller v. *Cornwall R. R. Co.*, 168 U. S., 134; 42 L. Ed., 411.
Capital City Dairy Co. v. *Ohio*, 183 U. S., 248; 46 L. Ed., 176.

(*b*) *The Petition for Writ of Error.*

The case at bar was tried and decided by the Tennessee Supreme Court on March 19, 1904. Nearly two years thereafter, on November 20, 1905, plaintiffs in error filed their petition for a writ of error, to bring the case into this Court. In this writ of error, *for the first time*, it is averred that a Federal question was presented and determined in the State Court.

The writ of error was granted by the Chief Justice of the Tennessee Supreme Court. No certificate from him seems to have been asked, and none was given. He merely directed that the "writ of error issue as prayed." (Rec., p. 2.)

It is settled that the averment in a petition for writ of error that a Federal question was raised and decided in the State Court is *insufficient* in itself to give this Court jurisdiction.

Leeper v. *Texas*, 139 U. S., 462; 35 L. Ed., 226.
Adams County v. *Burlington, etc., R. R. Co.*, 112 U. S., 123; 28 L. Ed., 678.
Cox v. *Texas*, 202 U. S., 445; 50 L. Ed., 1099.

This Court stated the facts in the case of *Leeper* v. *Texas*, *supra*, as follows (35 L. Ed., 226):

> "A petition for a writ of error from this Court was then presented and allowed by the presiding judge of the Court of Appeals. The petition set up, in substance, the same grounds which subsequently appeared in the assignment of errors, and averred that upon the trial there was 'drawn and called in question the construction of certain clauses of the Constitution of the United States, and the decision of said cause was adverse and against the rights, privileges, immunities and exemptions so especially set up and claimed under those clauses of the said Constitution of the United States.'"

The Court said (p. 227):

> "It must be regarded as settled that a petition for a writ of error forms no part of the record upon which action here is taken. *Manning* v. *French*, 133 U. S., 186 (33:582); *Clark* v. *Pennsylvania*, 128 U. S., 395 (32:487); *Warfield* v. *Chaffe*, 91 U. S., 690 (23:383); *Butler* v. *Gage*, 138 U. S., 52 (34:869). That to give this Court jurisdiction to review the judgment of a State Court under Section 709 of the Revised Statutes, because of the denial by the State Court of any right, title, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way. *Spies* v. *Illinois*, 123 U. S., 131, 181 (31:80,91); *Baldwin* v. *Kansas*, 129 U. S., 52 (32:640); *Chappell* v. *Bradshaw*, 128 U. S., 132 (32:369)."

So much for the petition.

(c) *Opinion of the State Court.*

There remains to consider *the opinion* of the Tennessee Supreme Court.

In instances this Court has looked to the opinion of the State Court to ascertain whether a Federal question was raised and decided by that Court.

In *Murdock* v. *Memphis, supra,* the Court, while recognizing this practice, says:

> "But after all, the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, *its record,* whether it be a case in law or equity, *must be the chief foundation of the inquiry;** and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new Act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

Where the record proper fails, as it does in this case, to show that a Federal question was raised, and it is sought to *infer* the presence of this question from the opinion alone, it must clearly and affirmatively appear in the opinion that the question was decided, and that it was necessary to the conclusion announced by the Court.

The opinion of the Supreme Court of Tennessee is contained on pages 30 *et seq.* of the record.

There is no reference in this opinion to any Federal question, unless it is *inferred* from the fact that the Supreme Court, in discussing the point of whether the corporation styled "Trustees of Carrick Academy" was a public or a private corporation, referred to the case of *Dartmouth College* v. *Woodward,* 4 Wheat., 519; 4 L. Ed., 629.

There is nothing in this opinion other than this reference to the Dartmouth College case to indicate that the Supreme Court was considering the validity of the Act of 1881 with reference to the contract clause of the Federal Constitution.

On the contrary it will be seen that *the court was discussing the constitutionality of that Act with reference solely to the State Constitution.*

*Italics ours.

One of the grounds of unconstitutionality alleged in the bill being Par. XIV, Sec. 7 (Rec., p. 13), is as follows:

> "7. Because said Act is in violation of Sec. 8, Art. 11, of the *Constitution of Tennessee*, which inhibits the passage of any law for the benefit of individuals inconsistent with the general laws of the land, or to pass any law granting any individual or individuals rights, privileges or immunities other than such as may be by law extended to any member of the community who may be able to bring himself within the provision of such law, and said Act is particularly in conflict with that part of the provision of the Constitution which prohibits the Legislature from increasing or diminishing by *special laws* the powers of a corporation."

The well settled construction given this provision by the State Courts was that it inhibited the passage of a special Act enlarging the charter powers of a private corporation, but *that it had no application to public corporations.*

Ballentine v. *Mayor, etc., of Pulaski*, 15 Lea (Tenn.), 637.
Williams v. *Nashville*, 89 Tenn., 490.
Reelfoot Lake Levee District v. *Dawson*, 97 Tenn., 177.

It was earnestly insisted by plaintiffs in error in the State Court, *under this constitutional objection,* that the Trustees of Carrick Academy was a private corporation, and that the Act of 1881, being by its terms a special Act applicable alone to this corporation, was obnoxious to this clause of the State Constitution.

By defendants in error it was there insisted that the corporation was a public corporation, and that, therefore, the Act was not within the inhibition of the clause referred to.

It was apparent that if Carrick Academy was a private corporation, the Act was amenable to this constitutional objection, and, the other objections being unimportant, *the case narrowed down to a determination of this matter.*

In *Davis* v. *State*, 3 Lea (Tenn.), 378, it was said:

> "They who insist upon the unconstitutionality of an Act must point out the specific provision of the Constitution which is violated."

No point was made that the Act violated the Federal Constitution.

The State Supreme Court was, therefore, considering the objection raised in the bill that the Act violated the Tennessee Constitution in the respect just pointed out, when it made use of the following language in its opinion (Rec., p. 39):

> "The predicate upon which the complainants rest their attack upon the Act authorizing the lease to Winchester Normal College is that Carrick Academy was a private corporation. . . .
>
> "In order to determine whether this assumption is sound, it is necessary to ascertain briefly the nature of corporations."

The Court in its opinion then considers the subject of public and private corporations, in the course of which it refers to the Dartmouth College case as a case which distinguished and defined the characteristics of these two classes of corporations, and concludes (Rec., p. 43):

> "We hold that this corporation was a public agency under the control of the State, and that the Act of the Legislature under which the lease of its property to the Winchester Normal College was made in 1881 was constitutional."

The language throughout the opinion is entirely appropriate to a discussion of this objection raised under the State Constitution, and which was sharply asserted in the pleadings.

Whether the State Court decided this question correctly will not be a subject of inquiry in this Court.

De Saussure v. *Gaillard*, 127 U. S., 216; 32 L. Ed., 125.
Hale v. *Akers*, 132 U. S., 565; 33 L. Ed., 446.

The record, even with the aid of the opinion of the State Court, ails to show *affirmatively* that any Federal question was "actually raised and actually decided."

It is earnestly submitted that the State Court *has never considered* the question sought to be raised in this Court, and that plaintiffs in error are now for the first time seeking to present it.

For this Court to assume jurisdiction now will not be to review the action of the State Court, but *to re-try here upon a new legal issue.*

For the reasons stated, defendants in error ask that the writ of error be dismissed.

II.

THE ACT DOES NOT IMPAIR THE OBLIGATION OF ANY CONTRACT.

This question cannot arise unless it shall be found that Carrick Academy was a private corporation. Its character in that respect will be discussed presently.

However, assuming first, for the purposes of argument, that it was a private corporation, it is submitted (1) that the corporation already had the power to make this lease; (2) that the Act affected nothing without the consent of the corporation; and (3) that the Act was assented to by the corporation.

There are always two questions to be considered in a case of this sort:

(A) Is the charter a contract? and
(B) If so, has it been impaired?
Dartmouth College v. *Woodward*, 4 Wheat., 650, 656.
We shall consider the latter question first.

A.

The Charter, if a Contract, was not Impaired.

(1)

Carrick Academy Already Had Power to Make this Lease.

The Act assumed to confer on the corporation the right to lease its property to the Winchester Normal College. The corporation already had this right. In the Act incorporating it, it was empowered:

> "To purchase, receive and hold, to it and its successors forever, any lands, tenements, rents, goods or chattels, which shall be given or devised to, or purchased by it for its use; *and to sell and dispose of the same in such manner as to it shall seem most advantageous.*" (Appendix, p. 44.)

The above clause in italics is omitted in the brief of plaintiffs in error, where they undertake to set out the charter in full, and they inadvertently fail to indicate the omission. (Brief, pp. 2, 3.)

The bill in this cause specifically averred that:

> "By the Act incorporating the academy the exclusive power and authority to dispose of its property was vested in the trustees, which has never been changed, altered or amended in any respect whatever."

It is a general principle of law that "in the power to dispose of is included the power to make leases."

Coal Creek, etc., Co. v. *Tennessee Coal Co.*, 106 Tenn., 667.
Morawetz on Corp., Vol. 2, Sec. 1121.

Accordingly the Act of 1881 *neither added to nor diminished* the contract rights and powers of Carrick Academy.

(2)

The Act Intrinsically Not Operative to Impair.

It is submitted that intrinsically the statute in question could not have impaired the obligation of the contract.

The statute does not act upon the contract. It does not impair its efficiency. It does not alter, either by diminishing or by augmenting, the respective obligations of the State and the corporation created by the charter.

By its express terms the Act assumed only to "*authorize*" the making of the lease, and to provide that, "*if the lease is made*," the *lessee* should keep up the property.

The Act took away no rights or property of the corporation. It *authorized* the corporation to do a certain thing. The doing of that thing was dependent upon the will of the corporation.

The Act neither directed nor prohibited the doing of anything.

Planters Bank v. *Sharp*, 6 How., 301; 12 L. Ed., 447:

> "One of the tests that a contract has been impaired is that its value has by legislation been diminished."

To this the Court, in *Edwards* v. *Kearsey*, 96 U. S., 595; 24 L. Ed., 796, adds:

> "It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account."

The Act in question here was no encroachment. It did not diminish the value of any contract right.

(3)

Carrick Academy Accepted the Provisions of the Act.

An Act will not be held to have impaired the obligation of a contract where it has been assented to by the party complaining.

This Act was passed in 1881. Thereupon the trustees united in making the lease authorized by the Act, thus expressing their *assent* to it, in the strongest way.

Thus matters stood until the filing of this bill some *twenty-one years thereafter*.

In the *Pennsylvania College Cases*, 80 U. S., 190; 20 L. Ed., 552, an Act of the Legislature of Pennsylvania *authorizing* the union of Washington and Jefferson Colleges was objected to as impairing the obligation of the charter contract, the two institutions having been theretofore separate corporations.

It appeared that, subsequent to the passage of the Act, the two corporations had *assented* to it, and had availed themselves of the *authority* thereby conferred.

This Court expressed the opinion that the charters in question were such as to reserve in the State the right to alter or amend them, and proceeded:

> "Suppose, however, the fact were otherwise; still the respondents must prevail, as it is admitted that the complainants accepted the Act passed to unite the two colleges, and to erect the same into one corporation."

Again, in the same case, this Court said:

> "Such amendments, alterations and modifications may, as a general rule, be made by the Legislature, *with the assent of the corporation*,* even in cases where the charter is unconditional in its terms, and there is no general law of the State containing any such reservation."

In *Regents* v. *Williams*, 9 Gill & J., 365; 31 Am. Dec., 103—a case cited and relied on by plaintiffs in error—it is said:

> "The passing of it, with nothing more, amounts to an offer only for acceptance; and if afterwards accepted, either expressly *or by acting under it*,* it then receives life and becomes an operative law."

Here the lease, by way of preamble, set out the Act of 1881 in terms, and recited that it was made under the authority of that Act. (Rec., pp. 14, 15.)

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*Italics ours.

B.

Charter of Carrick Academy was not a Contract.

The answer to this question depends upon whether Carrick Academy was a public or a private corporation.

This academy was one of a system of academies established by the State a century ago, in furtherance of an educational plan agreed on between the Federal Government and the State of Tennessee. The State entered into a compact with the government that it would employ the proceeds derived from the sale of some of the public lands *vested in the State* to the establishment and maintenance of this system of academies.

It was entirely within the power of the State to determine whether these academies should be private corporations or should be agencies of the State. There was nothing in the compact governing this matter, and indeed the compact seemed rather to contemplate that the academies should be State institutions.

There is no reason and no authority sustaining the view that a State, designing to establish a system of educational institutions under a compact such as this was, is under any obligation to constitute them as private corporations.

The State of Tennessee conceived that the better method would be to establish these county academies as State agencies, and to govern and control them as such; *and this was within its right to do.* The origin of the academies was governmental, they were intended *solely to further the educational interests of Tennessee,* and there was nothing in the inception of them that suggested any of the incidents of a private corporation.

This was not like the Dartmouth College case, where individuals were applying to the State for a charter, and where private funds had been accumulated in advance of the incorporation of the institution.

In this case the State selected individuals in each of its counties, and *solicited them* to become trustees of the several local academies. These trustees were neither required nor expected to contribute their personal means to the funds of the institution. They were not expected nor permitted to have any personal or private interest in the institution other than that which all good citizens should have. In other words, *it was a public duty that they were called upon to perform at the instance of the State.*

While they were authorized to receive gifts and contributions from private sources, yet such gifts and contributions were *no part of the original endowment* of these academies. The charter was not conferred for the purpose of administering a private endowment, as in the case of Dartmouth College; but, on the contrary and differing from that case, private means, if they were contributed for the benefit of the academies, were given after its incorporation as a public institution, and with the knowledge that it had been so incorporated.

In other words, just as public funds or public lands may be bestowed upon a private corporation so as to be beyond recall, and so as not thereby to confer any right on the State to control such corporations, so also private funds may be bestowed upon a public corporation, and it will not follow that private interests and rights of control arise therefrom.

The question of whether a corporation is a public or a private corporation is one that is determined *when it is incorporated*, and is dependent upon the circumstances attending the founding of the corporation, the source from which it at that time derives its means, and upon the intention of the State and of the incorporators, and upon the right of control and government, as vested by its charter.

Carrick Academy had its inception in the State. It was *established* by the State. It was to derive *its means* primarily from the State. It was *a part of a public system* extending

throughout the entire State, and it was, by its charter, *to be governed and controlled* by the State.

There was *no right of perpetual succession in its trustees.* Its charter provided as follows:

> "Upon the death, resignation, or other legal disability of any of the said trustees hereby, or which may be hereafter, appointed, the vacancy thereby occasioned shall be supplied *by the next or any succeeding General Assembly*, after such vacancy may occur, but may, nevertheless, be supplied by the remaining trustees, or a majority of them, until such vacancy or vacancies shall be supplied by the Legislature, as aforesaid." (See Appendix, p. 45.)

Again, the charter prescribed that judgment for failing to account for moneys received might be had against the treasurer, "on motion in any court of record in this State, and execution may thereupon be awarded *in like manner as against sheriffs* for the non-payment of public taxes." (Appendix, p. 46.)

The appointment of trustees by the Legislature for these numerous academies proving inconvenient, the power was by legislative Act bestowed upon the county court, another governmental agency, which, by the terms of the Act, should "have the same power and authority *as if the appointment had been made by the Legislature* of this State."

Acts of 1817, p. 136, Sec. 1; *Scott's Laws of Tennessee*, Vol. 2, p. 393.

These county academies did not have their origin in applications for charters from private citizens, made for the purpose primarily of administering funds contributed from private sources.

These county academies have throughout been *treated as public governmental institutions*, just as have been the University of Tennessee, the State Asylums for the Insane, the Tennessee Blind School, and the Tennessee Deaf and Dumb School, all of which operate under charters, for all of which the State appoints

trustees, and to all of which the State makes biennial appropriations. It was so with the common school system in the earlier history of the State. *Governor* v. *McEwen*, 5 Hum. (Tenn.), 241.

Thus the Code of Tennessee, adopted in 1858 (the only Code that has been adopted by the Legislature), under Title 7 of "Education," treats, Chapter 3, of "Common Schools;" Chapter 4, of "County Academies;" and Chapter 5, of "Colleges and Universities." Each of these three grades belongs to and is a part of one general system.

The opinion of the State Court in this cause refers to the fact, as evidencing the idea of the State that these academies were public governmental institutions, that the State had passed *some fifty or sixty private Acts*, each disposing or authorizing the disposition, in one way or another, of one of these county academies. These dispositions were made after the funds for the support of the academies had been exhausted, and in each instance the purpose of the disposition was *to further the cause of education* in the county where the particular academy was located. This was done sometimes by lease or transfer to another local school, as in the case of Carrick Academy, and oftentimes by turning the academy or its proceeds over to the common schools.

This suit presents the peculiar situation of trustees who are in a legal view *appointees of the State*, who have been authorized by the State to do a certain thing, who have then done that thing, and who are now claiming that the thing must be undone because the State had no right to confer such authority on them, and because they had no right to act under such authority.

Plaintiffs in error *are asserting* "in their own rights as citizens and taxpayers of Franklin County, and for and on behalf of the school fund, and of the school children, as well as *on behalf of the citizens and taxpayers of Franklin County*," that Carrick Academy is a *private corporation*, and are asking that the Court

decree a sale of the property of this private corporation, and that the proceeds "be paid into the treasury of the County of Franklin for the benefit of the school fund."

CASES CITED BY OUR ADVERSARIES.

The Dartmouth College Case, 4 Wheat., 518.

An examination of this case will show that the very reasons emphasized there as characterizing Dartmouth College as a private corporation conclusively establish that Carrick Academy was a public corporation.

Dartmouth College was merely *the continuation of a private eleemosynary institution* which had previously existed for a number of years, and which it was thought best to incorporate with a view of enlarging it, adding to its endowment, and increasing its usefulness. There was about it no one of the elements hereinabove referred to as establishing that Carrick Academy was a public corporation.

Chief Justice Marshall says:

> "From this brief review of the most essential parts of the charter, it is apparent that the funds of the college consisted *entirely of private donations.*"*

Again he says:

> "The origin of the institution was, undoubtedly, the Indian charity school established by Dr. Wheelock, *at his own expense.* It was *at his instance* and to enlarge this school that contributions were solicited in England. . . . The charter of incorporation was granted *at his instance.*"*

Another quotation from his opinion is as follows:

> "*The particular interests of New Hampshire never entered into the minds of the donors,** never constituted a motive for their donation. The propagation of the Chris-

*Italics ours.

tian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these New Hampshire would participate; but nothing particular or exclusive was intended for her."

And again, he says:

"Its trustees or governors were originally named by the founder [Dr. Wheelock], and *invested with the power of perpetuating themselves.*"*

The distinguished Chief Justice thus reached his conclusion that Dartmouth College was a private institution, for the following reasons:

(1) Its funds consisted entirely of private donations.

(2) Its founder was a private person.

(3) The charter was granted at his instance.

(4) The particular interests of the State incorporating it never entered into the minds of the donors.

(5) Its trustees were self-perpetuating.

With respect to each one of these features Carrick Academy presents the converse condition. This has already been pointed out.

The opinion in the Dartmouth College case expressly recognizes that the character of civil institutions grows out of "*the manner* in which they are formed, and *the objects* for which they are created."* Continuing, the Court says:

"The right to change them is not founded on their being incorporated, but on their being *the instruments of government created for its purposes.** . . . The incorporating act neither gives nor prevents this control."

*Italics ours.

The Court says:

> "If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or *if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions*, the subject is one in which the Legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States."*

Within the full meaning of this authoritative definition, Carrick Academy was a public corporation.

Vincennes University v. Indiana, 14 How., 269; 14 L. Ed., 416.

This case seems to be relied on as establishing, by analogy, that the compact between Tennessee and the Federal Government prevented the possibility of these academies being State institutions.

In this case—which was decided by a divided court—it was held that Vincennes University was a private corporation, and that the State had no right to assume control over its property.

It appeared that Congress had *reserved* from the public lands of the territory, which was afterwards formed into the State of Indiana, a certain portion "to be located by the Secretary of the Treasury," for the use of a seminary of learning. *The Secretary thereupon located the property*, and the territorial Legislature incorporated Vincennes University.

A majority of the Court was of opinion that the reservation by Congress held the title to the property selected by the Secretary in abeyance, and that upon the incorporation of Vincennes University the title at once vested in that institution. It was therefore held that the title to this property had *never been in the State*, so that there was no basis whatever for the claim of State control.

*Italics ours.

It was further claimed, on behalf of the State, that if title had not vested in it as a Territory, yet it did thereafter vest in it under a section of the Act admitting the State into the Union, as follows:

> "That one entire township, which shall be designated by the President of the United States, in addition to the one heretofore reserved for that purpose, shall be reserved for the use of a seminary of learning, and vested in the Legislature of the said State, to be appropriated solely to the use of such seminary by the said Legislature."

The Court held that the very words of this Act indicated that it was only the additional township that was to vest in the State, and that the township originally selected and turned over to Vincennes University was not so to vest.

Of this section Chief Justice Taney, in his dissenting opinion, says that "it appears plain to me that this township, as well as the additional one, are both granted to the State by Congress."

The Court, in the majority opinion, further says:

> "This corporation had no political powers, and could in no legal sense be considered as officers of the State; *they were not appointed by the State.*"

The majority of the Court rests its conclusion of law that the university was not a public corporation upon its conclusion of fact that the property had never at any time vested in the State. The minority arrived at the opposite conclusion of fact, and in consequence concluded that the university was a public corporation. *The determining consideration was whether the property had ever vested in the State.*

In the case of Carrick Academy the lands were not bestowed by the Federal Government, but such right and interest as the government had in them were expressly *"ceded and conveyed to the State of Tennessee,"* and it was an express provision in the

agreement that Tennessee should set apart lands for the academies, and that these lands should be *"subject to the disposition of the Legislature of he State."* (Appendix, pp. 40, 42.)

For the very reason which controlled the decision of the Vincennes University case, it must result in this case that Carrick Academy was a public corporation.

Regents v. Williams, 9 Gill & J., 365; 31 Am. Dec., 72.

It is sufficient to say of this case that it was expressly found by the Court that "the State was not the founder in the sense of that term as applied to corporations;" and that the State "gave to it in its creation the capacity to acquire and hold property, but *made to it no donation;*" and that the corporation in question *was conceived by private persons;* and that it was *established by private funds;* and that its governing body was *self-perpetuating.*

In these respects it was like the case of Dartmouth College, and in all of them wholly unlike the case of Carrick Academy.

Trustees of New Gloucester v. Bradbury, 11 Maine, 118.

In this case certain property had been granted by Massachusetts to the town of New Gloucester, for the use of schools. The grant was absolute, and "the sovereign power then had no further control of the lands." Thereafter by an Act of the Legislature, *"passed by the consent and upon the application of the town,"* a corporation was created, and it was directed that the lands be sold, and the proceeds "placed under the exclusive management and control" of the corporation, whose trustees were given *the right of perpetual succession.* Thirty years thereafter, and again at the instance of the town, the Legislature undertook to legislate the trustees of the corporation out of office, and to empower the town to elect trustees from time to time.

The latter act was declared unconstitutional upon the ground that the fund had been voluntarily turned over to trustees, to

whom was given the right of perpetual succession, and over whom the town had reserved no right of control.

Allen v. McKean, Fed. Cas. No. 229, Vol. 1, p. 489.

Here the Legislature had incorporated certain trustees of Bowdoin College *with the right of perpetual succession*, and had vested certain townships of land "in the trustees of the college, and their successors forever, for the use, benefit, etc., of the college, with power to dispose of them," etc.

Large funds were also contributed to the college from private sources. Thereafter the Legislature undertook to make radical changes in the charter, among which was one legislating the president out of office.

It did not appear that the college was intended to be a State institution, or that the State had reserved any right of control over it, or that it was to derive its maintenance from the State, and the only fact affording any color to the claim that it was a public corporation was that the State had made it a gift of certain lands. The fact that its trustees were made self-perpetuating negatived the idea that the State intended to reserve any rights of control. The Court held that Bowdoin College was thereby created as a private corporation, and that the Legislature "could not resume their grant."

Yarmouth v. North Yarmouth, 34 Maine, 411.

This case is quite similar to that of the trustees of Gloucester, *supra*. It was a case where a town owning certain lands caused them to be sold and the proceeds turned over to a corporation, to be administered for school purposes. This was a matter entirely between the town and the corporation, and was done with the town's assent. Thereafter, and *over the objection of the town and the corporation*, the Legislature undertook to make a division of this school fund, and to require the corporation to surrender a portion of it. The Court held that there was no warrant for this assumption of State control.

Board of Education v. Greenebaum, 39 Ill., 609.
Board of Education v. Bakewell, 122 Ill., 339; 10 N. E. 378.

In both of these cases the Illinois Court was considering the legal status of a certain normal university.

It appeared that this university had been originally established under its charter *with private funds*, and that it was not then intended to be a State institution, or to be supported by State funds. It was, therefore, *in its inception a private corporation*, and the Court was properly of the opinion that its character in this respect was not altered because of the mere fact that thereafter the Legislature assumed to consider it a State institution, and made appropriations for it. The Court found that a certain county in the State pledged funds amounting to $160,000 for a site and building, and that this gift was accepted, and that the school was "erected, not at the expense of the State, but of individuals;" and that this donation "was a free gift by charitable individuals *to the corporation, not to the State.*"

These decisions merely illustrate what has heretofore been pointed out, that, under certain circumstances, a State may, at its election, establish a certain institution as a public agency, or as a private corporation; and that, where it was originally made a private corporation, the mere gift to it thereafter of public funds will not, without its consent, alter its character, so as to subject it to the control of the State.

In the case of Carrick Academy it affirmatively appears from the bill that it was maintained "with its *pro rata* of the funds arising from the sale of *the academy lands*, and other sources," until compelled to discontinue because "the fund arising from the sale of the academy lands had been exhausted;" and that during the period of its operation it was under "*the fostering care of the State*" (Rec. p. 9). It does not affirmatively appear that any gifts were made to it from private sources, but if there were any they were made to it after it had been established as a public corporation.

Downing v. Indiana State Board of Agriculture (Ind.), 12 L. R. A., 664.

In this case it appeared that the State had incorporated an agricultural body, giving its trustees the right of perpetual succession, and without making to it any appropriation whatsoever. The Court found as a fact that its funds had been received *from private sources*, and that it was intended to be, and was, a private corporation, and not a State agency.

OUR AUTHORITIES.

The proposition for which we are contending is that where the origin of an educational institution is governmental, and where it is to be one of a system of similar institutions provided by the State for each of the counties thereof, and where it is to derive its maintenance from a common fund provided by the State, to be held and administered by the State for the common use and benefit of all these institutions, and where the State proposes to appoint the governing body of the institution, and to reserve to itself the right to fill all vacancies therein—that where these are the conditions attending the establishment of an institution, *the State has the right to determine whether the institution shall be a public or a private institution*, and that when this has been determined, then, as was said in the Dartmouth College case, the mere fact that a charter was granted to it will not alter its character in this respect.

These were the conditions attending the founding of Carrick Academy. From what has been said of its origin and history it is evident that the State intended to establish it as a public educational agency, and as public agencies it and the other county academies have for a century been uniformly regarded by the Legislature and courts of Tennessee.

Reference has already been made to the fact that the Tennessee Legislature has, during the last fifty years, by special Acts, made disposition of *some fifty or sixty* of these county academies, such disposition being always in furtherance of the cause of education.

In its opinion in the case at bar, the Supreme Court of Tennessee, speaking through Chief Justice Beard, said (112 Tenn., 496, Rec. pp. 40–41):

> "It was purely one of the educational agencies of the State, created for the diffusion of knowledge in the various communities where located. The legislation out of which sprang this and the other academies of like nature, however crude, was the first effort of the State to bring education to the door and within the means of every citizen of the commonwealth. It was the beginning of a long series of efforts, which were often abortive, but as often renewed, to establish a public school system in the State; and that which we have to-day can be historically traced to the initial Acts of 1806 and 1809.
>
> "Being public agencies established by the State to subserve a public purpose, we see no more reason to doubt the power of the Legislature to pass the Act in question than to enact legislation to create and destroy municipalities, and to exercise control at its pleasure over the various benevolent institutions and their properties established throughout the State."

Governor v. McEwen, 5 Humph. (Tenn.), 241.

The opinion in this case was rendered by one of the greatest of Tennessee's judges, Judge Turley. The case is strikingly analogous to the one at bar, and is very fully reported. It declares the status of a State educational corporation, and the right of the Legislature to control it, and the property entrusted to it.

In 1836 the Legislature created a body politic and corporate by the name and style of "The Board of Commissioners of Common Schools," with authority to "hold and possess property of any kind in trust for the use of common schools," etc. The corporation was to be composed of the State Treasurer, the State Comptroller, and the State Superintendent of Public Instruction, the latter being made the executive officer.

It will be recalled that provision was made for the common schools in the same compact with the Federal government in which provision was made for the county academies, and the fund involved in this opinion is referred to as *the college and academy fund*, as well as the school fund.

McEwen was Superintendent of Public Instruction, and the suit was brought to recover a certain portion of these funds alleged to have been lost by want of proper care and prudence on his part. While the suit was pending, the Legislature appointed commissioners, with authority to compromise it, and a compromise was agreed on. The question was thus sharply presented whether the Legislature had the power to adjust a claim in favor of this corporation. The determination of this question depended on whether the corporation was public or private.

It is apparent that the corporation styled "The Board of Commissioners of Common Schools," under consideration in this case, was *very similar in its status and attributes to the several county academy corporations*. The same contention that the corporation was private was made in that case, and the same arguments were brought forward in support of that contention that are adduced here.

The Court considered the matter exhaustively and held that the corporation was *a public agency*, and as such under the control of the Legislature. The Court said (pp. 287, 288):

> "The General Assembly has thought proper to incorporate the Board of Commissioners for Common Schools, as a matter of convenience, not that the Constitution directed it, and has authorized them, as a body corporate and politic, to hold and possess property of every kind in trust for the use of common schools, to sue and be sued, etc., and makes the superintendent the president of the corporation. . . . *These public corporations are made for public convenience; no private rights are involved in them; and, therefore, the Legislature in interfering with them is in no danger of violating the obligation of contracts*

*or public faith,** and although it may have thought proper to delegate a portion of its own legitimate power to such corporation, for the public benefit, yet the same may be resumed at any time, and exercised temporarily by the Legislature, at its discretion; or the corporation may at any moment be deprived of it altogether."

Mobile School Commissioners v. Putnam, 44 Ala., 506.

In 1826 the Legislature of Alabama created a *corporation* known as the Mobile School Commissioners. The funds of this corporation, which were intended for the advancement of education in that county, were to be derived wholly *from the bounties of the State and the United States* and from certain revenues accruing to the Treasurer of the county from fines, forfeitures, etc., "all of which were set apart as a fund, not for the benefit of the commissioners, but as a special fund for the endowment and support of schools in said county."

The Court says of this corporation:

"There was neither stock nor stockholders, nor was any consideration paid by them, nor by any other person, for the charter of incorporation, if such it can properly be called; it was wholly a matter of public concern, and for public benefit, and consequently *nothing in the nature of a contract was created** between the State and said Commissioners, or the people of the city and county of Mobile, either as a body corporate or as individuals. It was, and was intended to be in all its essential characteristics and attributes, *a public institution or corporation,** created for public purposes, and therefore subject to be altered, amended, or even repealed by the Legislature."

Trustees of the University of Alabama v. Winstead, 5 Stew. & Por., (Ala.) 17.

Here the Court, speaking of a like institution, says:

"If the property possessed by a corporation is altogether the property of the State; if the corporation have

*Italics ours.

paid nothing amounting to a valuable consideration for the act of incorporation; in fine, if there is no contract upon valuable consideration between the State and the corporators, it is a public corporation, and if it be public it is certainly within the complete control of the General Assembly."

State of Florida ex rel. v. Knowles, 16 Fla., 577.

Congress, by Act of 1862, granted certain public lands to be apportioned among the States, equal to 30,000 acres for each Senator and Representative, the moneys to be invested and to constitute a perpetual fund, and the interest to be appropriated to the endowment and support of at least one agricultural college. Florida thereupon incorporated the Florida Agricultural College, and a citizen donated 2,000 acres as a site.

The Legislature of 1877 removed the trustees and appointed others, and altered the form of organization and changed the location. The new trustees organized and demanded the property from the old trustees, which demand was refused. Suit was then brought.

The Court says:

"The next general proposition as to this statute is that it impairs the obligation of a contract. . . . The ground upon which this view is based is that this is a private corporation, not a public corporation. The corporation is itself *founded by the State through property derived from the Government of the United States.** These trustees are made by this Legislature the agents of the State to collect and disburse property appropriated by the general government to the State for a public purpose.

"There is not, and never was, any private property in the trustees in the funds. They were derived from the Government. The founder of this institution was the government of the State of Florida, and the property which constituted its basis was public moneys of the State of Florida, derived by it from the Government of the

*Italics ours.

United States, in trust for the establishment of an institution of this character.

"It never was the purpose of the State of Florida to give these trustees any private right to this property. Throughout the whole legislation they are shown to be *simple public agents to manage a public property.** The only right they have to it is by the legislation of the State, and every section of these acts shows that it was founded by public funds, and for a public purpose. 5 Stew. & Port., 23; 4 Wheat., 518.

"It may be true that any Legislature of the State appropriating these funds to any other purpose than that public purpose named in the Act of Congress might have been in bad faith, but that is a matter which does not concern these trustees, nor does this fact change the nature of the institution. . . .

"Holding their franchises subject to legislative action, legislation depriving them of them is due process of law."

Head v. Curators of University of Missouri, 47 Mo., 224.

The University of Missouri was established by the State. *Private citizens* of Boone County, in order to secure its location, subscribed $108,000 for its use, and an institution known as Columbia College gave to it its building and apparatus, valued at $10,000.

The Supreme Court of Missouri says with reference to the legal status of this university:

"But these contributions to the building fund did not constitute the contributors founders of the university. Nor did the contributions alter the nature of the foundation, or change the character of the corporation. (*University of N. C.* v. *Maultsby*, 8 Ired., 257.) Between this and the Dartmouth College case, and the cases following that decision, there is a broad distinction, namely, the difference that exists between a public institution of the State and a private corporation.

*Italics ours.

"The State entered into no compact with private parties. The State established an institution of its own and provided for its control and government through its own agents and appointees. The Act creating the institution in its first section declares that a 'university is hereby instituted in this State, the government whereof shall be vested in a board of curators.' The university is then declared a 'corporation and body politic,' and invested with certain powers. These powers are given into the hands of a board which was made subject to the pleasure of the legislature. This is not the way in which a private corporation is brought into being and endowed with corporate franchises. A private corporation involves the idea of private parties and private rights. No such parties or rights were concerned in the institution of the University of Missouri. By establishing the university the State created an agency of its own, through which it proposed to accomplish certain educational objects. In fine, it created a public corporation for educational purposes—a State University. (Ang. & Ames on Corp., Sec. 31–36; 5 Stew. & Port. (Ala.), 17; *Univ. of N. C.* v. *Maultsby*, 8 Ired, 257; *Bush* v. *Shipman*, 4 Scam. (Ill.), 190.)

Regents v. McConnell, 5 Nebraska, 423.

Under the Act of Congress authorizing the people of Nebraska to form a constitution and State Government, and providing for the admission of Nebraska into the Union, *the government had "granted to the State seventy-two sections of the unappropriated public lands, to be selected and located under the direction of the Legislature, for the use and support of a State university, and for no other purpose."** Thereafter the Legislature incorporated "the Regents of the University of Nebraska," and directed that the State Treasurer turn over to the treasurer of the corporation certain funds arising from the sale of said public lands. Later the Legislature abolished the office of treasurer of the corporation, and constituted the State Treasurer the custodian

*Italics ours.

of its funds. This Act was assailed as impairing the obligation of a contract. The Court held that the corporation was "not in any sense to be considered in the nature of a private eleemosynary corporation for the general promotion of learning, because its whole interests and franchises are the exclusive property and domain of the government itself, and therefore it is in the strictest sense a *public corporation*."*

Regents of University of Michigan v. Board of Education, 4 Mich., 224

The State chartered the university and turned over to it the control and management of a township of land, "which had been granted to Michigan by Congress for the use of a seminary of learning." The charter recited that the object of the university was "to provide the inhabitants of the State with the means of acquiring a thorough knowledge of the various branches of literature, science and the arts." The Court held that this was "a public corporation created for public purposes alone."

Thomas v. Industrial University, 71 Ill., 310.

In this case the Court says:

> "Is this university, then, a State institution, or is it a private corporation? It has been largely *endowed with funds by the State, received by donation for the purpose from the general government.** The Act by which it is organized places its control under the authority of the State. The Governor is required to appoint, and the Senate to confirm, the trustees who control the institution, except the Governor and Superintendent of Public Instruction are made *ex officio* members of the Board of Trustees, for the management of the fund, and the government of the university. . . . It was founded on donations from the general government, the County of Champaign, the Central Railroad, and it may be from private individuals. . . . Private individuals have no interest in or control over it, but it is, in every sense of the term, a State institution."

*Italics ours.

The Illinois Court was here again considering the very question presented in the case of *Board of Education* v. *Greenebaum*, *supra*, namely, whether a mechanic's lien could be asserted against the property of the corporation. The Court held that this case differed from the former one, and denied the right to a mechanic's lien on the ground that the institution was *a public corporation*.

Spalding v. People, 172 Ill., 48, 49 N. E., 995.

In this case it was again held, in reference to the same institution, the name of which had been changed to University of Illinois, that it was *a public corporation*, and that its Treasurer was therefore liable to indictment under a statute having reference to embezzlement by public officers.

Other cases to a like effect are *School Board* v. *Stuart*, 80 Va., 69; *Wambersie* v. *Orange Humane Society*, 84 Va., 453, 5 S. E., 28; and *Lewis* v. *Whittle*, 77 Va., 419.

The Act of 1881 is not repugnant to the Constitution of the United States. The lease of Carrick Academy was wise and beneficent. That corporation had not used its property for twenty or thirty years, and was without the means to do so, or the expectation of means. The lease preserved the property to the cause of education. By the terms of the Act and of the lease, the lessee was required to keep up and to make improvements on the property. When this lease expires public aid or private philanthropy may enable the institution to resume its career. A new generation will then applaud the wisdom that preserved this property, and will condemn the conduct of those who are now seeking to effect its sale and dissolution.

Respectfully submitted,

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APPENDIX.

Exhibit 1.

Chap. 10. An Act to ratify and confirm an Act of the Congress of the United States of America, entitled, "An Act to authorize the State of Tennessee to issue grants and perfect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same." *Passed September* 6, 1806.

Whereas, The United States, in Congress assembled, on the eighteenth day of April, in the year of our Lord one thousand eight hundred and six, passed an Act entitled "An Act to authorize the State of Tennessee to issue grants and perfect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same;" in the words following, to wit: "An Act to authorize the State of Tennessee to issue grants and perfect titles to certain lands therein described, and to settle the claims to the vacant and unappropriated lands within the same;

"1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That for the purpose of defining the limits of the vacant and unappropriated lands in the State of Tennessee, hereafter to be subject to the sole and entire disposition of the United States, the following line be, and hereby is established, to wit: Beginning at the place where the eastern or main branch of Elk River shall intersect the boundary line of the State of Tennessee; from thence running due north, until said line shall intersect the northern or main branch of Duck River; thence down the waters of Duck River to the military boundary line, as established by the seventh section of an Act of the State of North Carolina, entitled

'An Act for the relief of the officers and soldiers of the Continental line, and for other purposes' (passed in the year one thousand seven hundred and eighty-three); thence with the military boundary line west to the place where it intersects the Tennessee River; thence down the waters of the River Tennessee to the place where the same intersects the northern boundary line of the State of Tennessee.

"2. *And be it further enacted*, That upon the Senators and Representatives from the State of Tennessee, by an instrument signed and sealed by them, respectively, making known that in pursuance of the power in them vested by an Act of the General Assembly of Tennessee, entitled 'An Act to appoint agents to settle the dispute between this State and the United States, relative to the vacant and unappropriated lands within this State, and to procure the relinquishment of the claim of the United States to the same,' and by a resolution of the Senate and House of Representatives of the said State of Tennessee, passed in the year one thousand eight hundred and two, as instructed therein, they do, for and in behalf of the State of Tennessee, and in consideration of the provisions made in this Act, agree and declare that all right, title and claim which the State of Tennessee hath to the lands lying west and south of the lines hereinbefore established, within the limits of the State of Tennessee, shall thereafter forever cease, and that the lands aforesaid shall be and remain at the sole and entire disposition of the United States, and shall be exempted from every disposition or tax made by order or under the authority of the State of Tennessee, while the same shall remain the property of the United States, and for the term of five years after the same shall be sold; which said instrument shall be approved by the Senate of the United States, and entered at large in their journal, and deposited in the office of Secretary of State; the United States do thereupon cede and convey to the State of Tennessee all right, title and claim which the United States have to the territory of the lands lying east and north of the line hereinbefore established, within the limits of the State of Tennessee, subject to the same conditions as are

contained in the Act of the General Assembly of the State of North Carolina, entitled 'An Act for the purpose of ceding to the United States of America certain western lands therein described,' and the said State of Tennessee shall thereupon have as full power and authority to issue grants and perfect titles to all lands lying east and north of the before described line, within the limits of said State, as Congress now have, or the State of Tennessee might have, by virtue of an Act of the State of North Carolina, entitled 'An Act to authorize the State of Tennessee to perfect titles to lands reserved to this State by the cession act,' to which said Act the assent of Congress is hereby given, so far as is necessary to carry into effect the object of this compact; subject nevertheless to the following express conditions, that is to say:

"First. That all entries of land, rights of location and warrants of surveys, and all interfering locations which might be removed by the aforesaid Act of cession of the State of North Carolina, and which are good and valid in law, and which were not actually located west and south of the hereinbefore described line, before the twenty-fifth day of February, one thousand seven hundred and ninety, and all interfering grants which are good and valid in law, and which have been located east and north of the said line, shall be located and the titles thereto perfected within the territory hereby ceded to the State of Tennessee.

"Second. That the State of Tennessee shall appropriate one hundred thousand acres, which shall be located in one entire tract within the limits of the lands reserved to the Cherokee Indians by an Act of the State of North Carolina, entitled 'An Act for opening the land office for the redemption of specie and other certificates, and discharging the arrears due the army,' passed in the year one thousand seven hundred and eighty-three, and shall be for the use of two colleges, one in East and one in West Tennessee, to be established by the Legislature thereof; and one hundred thousand acres in one tract, within the limits last aforesaid, for the use of academies, one in each county in

said State, to be established by the Legislature thereof; which said several tracts shall be located on lands to which the Indian title has been extinguished, and subject to the disposition of the Legislature of the State, but shall not be granted or sold for less than two dollars per acre, and the proceeds of the sales of the lands aforesaid shall be vested in funds for the respective uses aforesaid, forever; and the State of Tennessee shall moreover, in issuing grants and perfecting titles, locate six hundred and forty acres to every six miles square in the territory hereby ceded, where existing claims will allow the same, which shall be appropriated for schools for the instruction of children forever: *Provided*, That nothing contained in this Act shall be so construed as to effect the Indian title, or to subject the United States to the expense of extinguishing the same; *And provided also*, That the lowest price of lands granted or sold within the ceded territory shall be the same as shall be established by Congress for the lands of the United States; *And provided, nevertheless*, That the people residing in said State, south of French Broad and Holston, and west of Big Pigeon Rivers, provided for by the Constitution of the State of Tennessee, shall be secured in their respective rights of occupancy and preëmption, and shall receive titles for such quantities as they may respectively claim, including their improvements, not exceeding six hundred and forty acres each, nor exceeding the quantities they have heretofore claimed, respectively, according to their conditional lines, where such have been established, at a price not less than one dollar per acre; *And provided further*, That nothing herein contained shall be construed to enable any person or persons until authorized by the Legislature of the State of Tennessee to locate any warrant issued under the authority of the State of North Carolina, within the limits of the lands reserved to the Cherokee Indians, by the fifth section of the Act of said State, entitled 'An Act for opening the land office for the redemption of specie and other certificates, and discharging the arrears due the army,' passed in the year one thousand seven hundred and eighty-three.

"3. *And be it further enacted*, That if the territory hereinbefore ceded to the State of Tennessee shall not contain a sufficient quantity of land fit for cultivation, according to the true intent and meaning of the original Act of cession, including the lands within the limits reserved by the State of North Carolina to the Cherokee Indians, to perfect all existing legal claims charged thereon, by the conditions contained in this Act of cession, Congress will hereafter provide by law for perfecting such as cannot be located in the territory aforesaid out of the lands lying west or south of the before described line.

"NATHL. MACON,
"Speaker of the House of Representatives.
"S. SMITH,
"President of the Senate, Pro Tem.

"Approved, April 18, 1806.
"TH. JEFFERSON."

Therefore, Be it enacted by the General Assembly of the State of Tennessee, That the same hereinbefore recited Act be, and the same is hereby accepted, ratified, and confirmed to all intents and purposes, by and on the part of the State of Tennessee, and that the provisions thereof be carried into effect.

EXHIBIT 2.

ACTS OF 1806, CHAPTER 8.

(Scott's Edition Laws of Tennessee, Vol. 1, p. 931.)

AN ACT to establish academies in the several counties in this State, and for the appointment of Trustees thereof.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That Daniel Perkins, John Sappington, Nicholas T. Perkins, Chapman White, and Abraham Maury, Senior, shall be, and they are hereby created a body politic and corporate, to be known by the name of the Trustees of Harpeth Academy, in the County of Williamson.

That, etc., etc. (Here follows the appointment of other Trustees for other academies in other counties.)

SEC. 2. *Be it enacted*, That the Trustees of each of said academies, and their successors, by the names aforesaid, shall be capable in law to purchase, receive and hold, to them and their successors forever, any lands, tenements, rents, goods or chattels, which shall be given or devised to, or purchased by them for the use of said academies; and to sell and dispose of the same in such manner as to them shall seem most advantageous for said academies. The said Trustees by the names aforesaid may sue and be sued, plead and be impleaded in any court of law or equity. They shall have power from time to time to establish such by-laws, rules and ordinances, not contrary to the laws and constitution of this State, as they shall judge necessary for the good government of the said academies, and to appoint a President, Secretary, tutors, treasurer, and other persons necessary for conducting the business of the institution. A majority of said Trustees shall constitute a board to determine upon any matter relative to the establishment, government or support of their respective academies; but no

real estate belonging to either of the said academies shall be disposed of unless two-thirds of the Trustees thereof concur in opinion thereon. Upon the death, resignation, or other legal disability of any of the said Trustees hereby, or which may be hereafter appointed, the vacancy thereby occasioned shall be supplied by the next or any succeeding General Assembly after such vacancy may occur, but may, nevertheless, be supplied by the remaining Trustees, or a majority of them, until such vacancy or vacancies shall be supplied by the Legislature, as aforesaid.

The several Boards of Trustees shall each elect a treasurer, who shall receive all moneys accruing to the said academies, and property delivered to his care, and pay and deliver the same to the order of the said Trustees, and before he enters upon the execution of the duties of his office, shall give bond and security for such sum as the Board of Trustees by whom he is appointed shall direct, payable to them and their successors, and conditioned for the faithful discharge of the trust reposed in him, and that he will, when required by the said Trustees, render to them a true account of all moneys, goods and chattels received by him on account of, and for the use of, the said academy; and the treasurer shall receive such salary as may be allowed and fixed by the Trustees.

SEC. 3. *Be it enacted*, That the said Trustees shall have the power to fix on and purchase a site for their respective academies, and to take and receive subscriptions for paying for the same, as well as for the purpose of erecting and building the academy, and any other building which they may think necessary thereto, and if any person shall neglect or refuse to pay the money by him subscribed for that purpose, it shall be lawful for the said Trustees to recover the same by warrant before a justice of the peace, when the subscription shall not exceed fifty dollars; and where it shall exceed that sum, by motion in the court where the delinquent subscriber resides; *provided*, the party has ten days' previous notice of such motion. And if the

treasurer shall fail to render, when thereunto required, a just and true account of all moneys, goods and chattels which have come to his hands by virtue of his office, and also all expenditures relative to the said academy, he shall, on such failure, be subject to a judgment, on motion in any court of record in this State, and execution may thereupon be awarded in like manner as against sheriffs for the non-payment of public taxes.

SEC. 4. *Be it enacted*, That the Legislature may from time to time, at periods not less than two years distant from the other, appoint two additional Trustees to each board; *provided*, the number of Trustees for any of the aforesaid academies shall never exceed thirteen.

SEC. 5. *Be it enacted*, That until a President shall be elected for each of the said academies, and shall have entered upon the duties of his office, and also in all cases of a vacancy, or the absence of the President, the said Trustees shall appoint one of their number to preside in their meetings. All the doings and acts of the Trustees while acting under such circumstances shall be considered in law as the doings and acts of the board, as fully and completely as when the President of the Academy shall be in office and preside.

SEC. 6. *Be it enacted*, That it shall be the duty of the first person named as Trustee for each academy by this Act established to fix the time for holding the first meeting of the board, which shall be at the courthouse of the county in which such academy is established, or at the place of holding court for said county, of which he shall give notice in to each member, at least ten days previous to such meeting.

SEC. 7. *Be it enacted*, That this Act shall be deemed a public Act, and as such shall be judicially taken notice of without special pleadings in all courts of law and equity within this State.

ROBERT C. FOSTER,
Speaker of the House of Representatives.
JOSEPH MCMINN,
Speaker of the Senate.

September 13, 1806.

EXHIBIT 3.

ACTS OF 1809, CHAPTER 109.

(Scott's Edition, Laws of Tennessee, Vol. 1, p. 1198.)

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That . . . . William Metcalf, James Hunt, James Cunningham, Richard Calloway, Christopher Buller and George Taylor shall be and they are hereby constituted a body politic and corporate, to be known by the name of the Trustees of Carrick Academy, of the County of Franklin. . . . .

SEC. 2. *Be it enacted*, That the Trustees of each of the academies aforesaid, and their successors, by the names aforesaid, shall have the same powers, prerogatives and immunities, and be subject to the same rules, regulations and restrictions that are given to and prescribed for the Trustees of the academies of the other counties of this State, by an Act to establish academies in the several counties of this State, and for the appointment of Trustees thereof, passed September 13, 1806.

SEC. 3. *Be it enacted*, That this Act shall be in force from and after the passing hereof.

JOSEPH DICKSON,
Speaker of the House of Representatives.

JOSEPH MCMINN,
Speaker of the Senate.